MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW SCHOOL OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE $2.50 PER YEAR. 35 CENTS PER NUMBER

NOTE AND COMMENT

LIABILITY OF MANUFACTURER TO REMOTE VENDEE FOR DEFECTIVE AUTOMOBILE WHEEL.—Plaintiff, in February, 1909, purchased from the Utica Motor Car Company, a Cadillac six-passenger touring car, manufactured by the Cadillac Motor Car Company, of Michigan. The Utica company was a dealer in motor cars, and purchased to resell; it was the original vendee, and the plaintiff was the sub-vendee.

The car was used very little until July 31, 1909, when the plaintiff, an experienced driver, while driving the car on a main public road in good condition, at a speed of 12 to 15 miles per hour, was severely and permanently injured by the right front wheel suddenly breaking down and the car turning over on him.

He commenced action in the Supreme Court of New York in 1910. This was removed to the Federal Court for the Northern District of New York, where he had judgment for $8,000. This was reversed by the Circuit Court of Appeals, (LaCombe, Coxe, and Ward, JJ.), in an opinion by Ward, J., Coxe, J., dissenting, (221 Fed. 801, 1915).

The action was tried again, without a jury. The court found that the injuries were caused by the negligence of the defendant; that the plaintiff

was free from contributory negligence; and that the damages amounted to $10,000. Yet, relying on the former decision of the Court of Appeals, the court gave judgment for the defendant. The court also found: that the automobile was manufactured, assembled, and put on the market by the defendant with a weak and defective wheel; that this was the proximate cause of the accident; that the car when put on the market, was dangerous to human life; that defendant ought to have known this, and had it exercised ordinary care would have known it; that although the defendant did not manufacture, but purchased, the wheels, it carelessly failed to use reasonable inspection and tests to discover the real condition and weakness of the wheels.

The complaint was based on negligence only. There was no allegation of fraudulent representations by the defendant. Evidence, however, was admitted to the effect, and the judge found, that the defendant, in its catalogue represented that its cars were equipped with the best wheels obtainable, equal to those used on the highest priced cars; of the artillery type, made from well seasoned second growth hickory, with steel hubs and spokes of ample dimensions to insure great strength; and that the plaintiff relied on these representations.

On the former appeal, the question was the same as here, i. e., whether the defendant owed a duty of care to the plaintiff, not being the immediate purchaser, but the sub-vendee, and it was held that since there was no contractual relation between the plaintiff and the defendant, there could be no recovery. The court then said: "One who manufactures articles inherently dangerous, e. g., poisons, dynamite, gunpowder, torpedoes, bottles of water under gas pressure,—is liable in tort to third parties which they injure, unless he prove that he has exercised reasonable care with reference to the article manufactured. * * * On the other hand, one who manufactures articles dangerous only if defectively made or installed, e. g., tables, chairs, pictures or mirrors hung on the walls, or carriages, automobiles, and so on,—is not liable to third parties for injuries caused by them except in case of willful injury or fraud."

On this appeal the defendant relied on the rule "that whatever has been decided on one appeal cannot be re-examined on a second appeal in the same suit." While the court admitted this was the general rule, yet, by Rogers, J., it said this is a rule "of public policy of private peace," but not an inexorable one, "and should not be adhered to in a case in which the court has committed an error which results in injustice, and at the same time lays down a principle of law for future guidance which is unsound and contrary to the interests of society. * * * We shall not consider at length the reasons which have satisfied us that a serious mistake was made in the first decision. The reasons may be found in the opinion in" *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, decided since the former decision in this case. "We cannot believe that the liability of a manufacturer of automobiles has any analogy to the liability of a manufacturer of tables, chairs, pictures or mirrors hung on the walls. The analogy is rather that of the manufacturer of unwholesome food or of a poisonous drug. It is every bit as dangerous to put upon the market an automobile with rotten spokes as it is to send out to the

trade rotten foodstuffs." (*Ketterer* v. *Armour & Co.*, 247 Fed. 921). The judgment was, therefore, reversed, Manton, J., concurring with Rogers, J., and Ward, J., dissenting, on the ground that the former decision was the law of the case and was *res judicata*. *Johnson* v. *Cadillac Motor Car Co.*, (1919) 261 Fed. 878. The opinion of Ray, J., in the District Court (194 Fed. 497), is valuable.

The history of this case illustrates the difficulty the courts have with the problem involved. Beginning with *Langridge* v. *Levy* in 1837, (2 M. & W. 519, 4 M. & W. 337), D, who falsely warranted to P's father, who purchased for use of himself and his sons, the make of a gun which burst and injured P while he was using it, was held liable to P. In *Winterbottom* v. *Wright*, (1842), 10 M. & W. 109, P, relying on a contract between D and the Postmaster General to keep in repair the mail coaches to be used by P's employer who had contracted to carry the mails, was not allowed to recover damages for an injury caused by the breaking down of the coach which P was driving, due to D's failure to keep in repair as agreed. In *Longmeid* v. *Holliday*, (1851), 6 Exch. 761, P could not recover for injury from the explosion of a defective lamp which P's husband had purchased for the use of himself and his wife, from D who did not make the lamp, know of the defect, or make any representations concerning it, although the husband had an action against D on an implied warranty that the lamp was sound. In *Thomas* v. *Winchester*, (1852), 6 N. Y. 397, P was allowed to recover for injury from taking belladonna (poison), used in a prescription calling for dandelion (harmless), filled by a retail druggist from a bottle falsely labeled 'dandelion,' purchased from a wholesale druggist, who bought from D, the manufacturer, whose employee had negligently mislabeled the bottle,—on the ground of the inherently dangerous character of the poisonous drug. These are the foundation cases.

In *Huset* v. *Threshing Machine Co.*, (1903), 120 Fed. 865, Judge SANBORN reviewed the cases, and formulated the matter thus: The general rule is that the manufacturer is not liable to third parties who have no contractual relations with him for negligence in the manufacture of the articles he handles. There are three exceptions: (1) An act of negligence of a manufacturer which is imminently dangerous to life or health, committed in the preparation of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer therefrom,—*Thomas* v. *Winchester, supra.* (2.) An owner's act of negligence causing injury to one invited to use his defective appliances on his premises makes him liable,—*Heaven* v. *Pender*, (1883), L. R. 11 Q. B. D. 503. (3.) One who delivers an article which he *knows* to be imminently dangerous to life, to another without notice of its qualities, is liable to any person who suffers an injury therefrom which might have been reasonably anticipated. In this case the declaration alleged that P was injured by the breaking of the defective running board over the cylinder of a threshing machine which D *knew* was unsafe when he sold the machine to P's employer. This was held sufficient on demurrer,—but the court remarked that on the trial P probably would fail to prove D actually knew of the defect.

The courts have not yet arrived at any consistent theory of liability. The *Cadillac* and *Buick* cases, above, put the defective touring cars in the class of inherently dangerous things, but a Ford car is not such in Oklahoma, (*Ford Motor Car Co.* v. *Livesay,* (Okl., 1916), 160 Pac. 901). A folding bed is dangerous in California, (*Lewis* v. *Terry,* (1896), 111 Cal. 39), but an ordinary bed is not in New York, (*Field* v. *Empire & Co.,* (1918), 166 N. Y. S. 509). A buggy is not in New York, (*dicta* in *Thomas* v. *Winchester, supra*), but is in Georgia, (*Woodward* v. *Miller* (1904), 119 Ga. 618). Step-ladders are both in New York and in Minnesota, (*Miller* v. *Steinfeld,* (1917), 160 N. Y. S. 800; *Schubert* v. *Clark Co.,* (1892), 49 Minn. 331).

The *Schubert* and *Buick* cases, however, go a long way in establishing a rule that the maker of a thing to be used in a certain way, owes a legal duty to all who in the natural and ordinary course of events will probably use it in the way designed, to exercise reasonable care in its manufacture, proportioned to the danger from its use if defective, and is liable to such as are injured, when properly using it without knowledge of the defect, because of its defective condition, although the maker did not personally know of the defect, had no contract with the plaintiff, did not fraudulently deceive him, and the thing was not inherently dangerous otherwise than because of the defect. This approaches the principle stated by BRETT, M. R., (but not agreed to by the other judges), in *Heaven* v. *Pender, supra,*—"Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." The English courts still have difficulty with the problem. *Earl* v. *Lubbock,* [1905], 1 K. B. 253 (a van); *Blacker* v. *Lake & Elliot,* (1912), 106 L. T. 533 (a lamp); *White* v. *Steadman* [1913], 3 K. B. 340,—(a vicious horse); *Bates* v. *Batey & Co.,* [1913], 3 K. B. 351, (ginger-beer bottle); *British So. African Co.* v. *Lennon,* (1915), 85 L. J. (P. C.) 111 (poison cattle dip).

H. L. W.

CONTINUOUS TRESPASS AND REPEATED WRONG.—In the recent case of *Perkins* v. *Trueblood,* (Cal., May, 1919), 191 Pac. 642, the facts were that, in March, 1912, the defendant, a surgeon, set the leg of the plaintiff, but as the fracture did not heal satisfactorily "the defendant separated the surfaces of the bone during the month of April, 1912, and again set the plaintiff's leg." In a suit for malpractice, begun on April 9, 1913, it was *held,* that the cause of action "was not barred by the CODE OF PROCEDURE, Article 340, subd. 3, prescribing a one year limitation period in such cases." It is difficult to tell from the report of the case what the theory of the court was as to the cause of action and the running of the statute of limitation, but it is evident that the court must have considered this not a case of "continuous trespass," with the old connotation of that term, but rather as a case of "repeated wrong," and that the statute began to run not from March, 1912, when the leg was originally set, but from April, 1912, the date when it was negligently reset.